Volume XIII] *July, 1908* [*Number 4*

The

American Historical Review

THE ORIGIN OF THE ENGLISH CONSTITUTION, II.

CLAUSE 61 of Magna Carta comes nearer to putting into words the principles on which the barons acted, and on which the whole Charter rested, the principles which I stated in my first article, than any other portion of the document. But clause 61 is found only in the Charter of 1215. It was dropped from all reissues after the death of John and was never afterwards restored in any form. Again, it has been recently asserted of the Charter as a whole by an acute critic of English law and history[1] that, from its reactionary character and its consecration of the past, it proved "a positive stumbling block in the path of progress". He declares that this fact began to be perceived in the reign of Henry III.; that it was then seen that the Charter was not enough; and that the barons at the Parliament of Oxford in 1258 attempted an entire break with the past. If the origin of the English constitution is to be ascribed to the introduction into history as an active influence, of the principles which were most nearly formulated in clause 61, both these objections must be met.

Far too much has been made of the dropping of clauses from Magna Carta. Clauses 12 and 14 are usually thought of in that connection, perhaps because the historical importance of clause 61 has not been fully recognized, but the case is the same for all three. A little reflection ought to make it clear that, in all that was really important, the omission of these clauses made no difference either in the law as it stood, or in the fact that the king was bound to obey it in the particulars which they stated.[2] With the exception

[1] Professor Edward Jenks in an article entitled "The Myth of Magna Carta" in *The Independent Review* (1904), IV. 260–273.

[2] The board of twenty-five barons and its method of operation of course disappeared, but as far as the future is concerned this clumsy piece of machinery was not the essential point in cl. 61. From cl. 14 there may possibly have disap-

of some minor details, which concern chiefly questions of method, the provisions of these clauses were all drawn from the feudal law; their existence there the king could not deny; and he was just as much bound to regard them before June, 1215, and after November, 1216, as during the time when they formed a part of the Charter. The Charter was not drawn up to make these provisions law. The crisis had not arisen because the law was inadequate. The whole movement against the king proceeded on quite a different theory. The Charter seemed necessary because the king persisted in violating the law and could not easily be restrained. Its main purpose was to state the points which the king had violated, not in order to make them legal, or binding on him, but to secure from that particular king, because of what he had done in the past, a clear and formal acknowledgment of their legal and binding character and then to get his agreement to machinery for enforcing them in the future.[3] If John had had even as much regard for the law as had William I. in his time, the Charter would have been unnecessary, but the law which it states on these points would have been in force very much as the barons wished it to be.

This then is to be said with regard to the omission of clause 61

peared some new points of detail, if they were new, but I think rather that all its provisions remained in force. Cl. 14 is interesting in some minor points, but it was from the beginning an unnecessary addition to the Articles of the Barons and quite without importance, as I shall try to show elsewhere. In cl. 12 the barons seem to have been led by a difficulty of formulation into a demand in regard to scutage which custom did not warrant, and this was given up, but what they were trying to say was not given up, nor anything else in the clause.

The idea that the *curia regis*, described in cl. 14, might be made the basis of constitutional machinery to enforce the Charter, was wholly beyond the political horizon of the barons in 1215. The idea "constitutional" was an outgrowth of the fundamental law, binding the executive, then beginning its slow formation, and it would be impossible until there should be a considerable experience of enforcing that law against the king; it needed an equally slow transformation of the *curia regis* into the later Parliament, changing its relation to the other elements of the case, community and king, before it could be looked upon as the natural guardian of the fundamental law against royal encroachment. It would be the natural thought of the barons in 1215 that something new was required to meet the special need. This is what they sought to get in cl. 61, and cl. 61 was in harmony with the age and all that was possible to it. That it should be omitted in the reissue of 1216 was inevitable. However true it might be that the principle on which it rested was within the right of the barons, the method it enacted was revolutionary. No government could issue such a clause as a part of the law which it proposed to recognize without confessing its habitual disregard of its own duties and of the rights of others. Moreover, if the government could be trusted to administer affairs in harmony with the Charter, cl. 61 was unnecessary. The commission of twenty-five would have no work to do.

[3] Of course I do not deny that there was some new legislation in the Charter, and some definition of doubtful points as the barons wished them defined, but these were incidental and of secondary importance.

from the Charter: the fact did away with the committee of twenty-five, but did not affect the underlying legal principle on which the clause rested. In truth, the fate of this principle, and of all that was contained in the Charter of 1216, and of the whole body of law by which the king was bound, depended upon the character of the following age, whether the government should be conducted in harmony with the spirit of the Charter and its principles developed in natural and orderly growth; or by a strong king in a spirit hostile to these principles until they should become forgotten and obsolete; or by a weak king in a spirit neither consistently hostile nor friendly, in which case all growth would seem, more clearly than in the other cases, to be determined by the stronger currents of the age and the uncertain action of revolution. As a matter of fact, the impression made by the baronial revolt against John on the next generation seems to have been as decisive an influence in its history as anything in the language of the Charter itself, and it perpetuated not merely the Charter but all the circumstances and purposes of the insurrection.

When we turn to the second objection and consider the influence of the Charter as a definite body of law, and its relation to the next step forward—the Provisions of Oxford in 1258—we approach a more difficult question and one whose definitive answer requires a more minute examination of the reign of Henry III. than is possible here. It is, however, a most important question. It must be considered in some detail, and on its answer depends our understanding of the constitutional development through this critical age.

A fair regard for the law really describes the state of things for many years after the accession of Henry III. The Charter was reissued immediately on the death of John. It was reissued again after the withdrawal of Louis. So long as William Marshal lived, it is likely, on *a priori* grounds, that government would be carried on in harmony with the spirit as well as the letter of the Charter, and we know of nothing to the contrary. The first difficulty seems to have occurred in 1223, and the incident in a way strikes the key-note of the reign. According to the account of Roger of Wendover,[4] in January, in what seems to have been an adjourned meeting of the Christmas *curia regis,* the archbishop and others demanded the confirmation of the charters. What special reason there was for this demand at the time is not shown, but it would seem from other things that the financial difficulties of carrying on the government were beginning to be felt by those in authority.[5] They now

[4] Ed. Coxe, IV. 83.

[5] See the letter of Honorius III. to Pandulph of May 26, 1220, Shirley, *Royal Letters,* I. 535: "non sine causa miramur quod nunc carissimus in Christo filius

opposed the demand of the archbishop, and William Brewer, one of them, speaking probably for them and in the name of the king, declared that the grant of liberties, having been extorted by force, ought not to be observed. This excited the anger of the archbishop and he said: "William, if you love the king, you will not disturb the peace of the kingdom." Then the king seeing how greatly the archbishop was moved, declared that the oath which had been taken "to all those liberties" must be kept.

Henry III. at the time of this occurrence was in his sixteenth year. He was probably already beginning to take an interest in public affairs and very possibly had begun to show those personal characteristics which made the financial problems of his reign unnecessarily difficult. However this may be, this, his first recorded public act of his own, is strictly typical of his whole history. The confirmation of the Charter was demanded; those responsible for the government opposed the demand; their opposition was met by a threat of force; in fear of the consequences the king yielded. The tragedy of his father's reign made no more profound impression on the mind and policy of Charles II. than the insurrection and the Charter on the conduct of Henry III.[6] This fact has hardly been sufficiently noted among the influences which shaped the events of this reign. It is not strange that so impressionable a nature as Henry's should have received, in the especially impressionable years of boyhood, so deep a bent toward caution, or have acquired so great a dread of the power of revolted barons. Certain it is that never in his reign was he willing to carry resistance to pressure beyond a certain point, or to dare civil war, unless the odds in his favor were overwhelming. It is a special characteristic of the reign that, when the barons were united, the king yielded and what they demanded was done. It is in this sense that the incident of 1223 gives us the key-note of the reign. The only element which we cannot specify to make the case complete is the abuse which led

noster Henricus, rex Anglorum illustris, cum, ratione minoris aetatis, pauciora quam sui praedecessores expendat, tanta dicitur inopia laborare, quod vix, vel nunquam regali sufficit magnificentiae providere; quare gravis ipsi et tali regno potest imminere jactura." On May 18, 1219, Pandulph wrote to Ralph Neville to pay out none of the money coming into the exchequer, "cum, sicut bene novisti, dominus rex multis sit debitis oneratus", Shirley, I. 120. On the date of this letter see F. M. Powicke, *Engl. Hist. Rev.* (1908), XXIII. 229. Evidence of the king's poverty during the period might be multiplied. See especially the formal acknowledgment of a rather long list of debts due to Pandulph, February 18, 1221, *Pat. Rolls of Henry III.*, I. 283–284.

[6] Roger of Wendover (ed. Coxe), IV. 269; Matth. Par., V. 137, 339, 569; and the references in note 10.

to the demand for the Charter.[7] But these at least are typical: the demand was made; it was at first resisted; the pressure increased and developed into a threat of force; and the king yielded.

There was no confirmation in 1223, so far as we know. In 1225 the Charter was not merely confirmed; it was reissued, with only verbal changes from the reissue of 1217, unless the change in the preamble be thought more important, and in this form it became the Great Charter of English law. The case of that year is a simple one. The Great Council was asked for an extraordinary tax. The barons demanded a reissue of the Charter, as a condition of their consent, because the king had been declared of age and certain of the grants made in his name during the minority had been already annulled. The Charter does not seem to have been considered to be among the concessions affected by the minority, but it was evidently thought to be an important enough matter to justify this precaution.

[7] It would seem as if the financial necessities of the government were the most reasonable explanation of the efforts which were made during this period to call in, earlier than strict right allowed, the castles, domains and escheats, which had been allowed to remain in the hands of those to whom John had committed them, or which had been granted anew during the minority. On these and the efforts to recover them, see G. J. Turner, *Trans. Royal Hist. Soc.*, third series, I. 205–262. It was to aid in this process apparently that the pope was induced, in April of this year, to declare the king of age. The only reason which he gives for his act, which he seems to recognize as premature, is lest arrangements which had been intended for the king's benefit should become disadvantages. See Shirley, I. 430, and *cf.* Matth. Par., VI. 69. The point is even more clearly stated in the letter of May 26, 1220, Shirley, I. 535: "quidam eorum [the prelates] non quae regis, sed quae sua sunt illaudabili aviditate captantes, castra, maneria et villas et alia demania ejus improbe usurparunt et detinent usurpata, in evidentem ejusdem regis injuriam et jacturam, occasionem frivolam praetendendo, quod ea servare volunt usque ad plenam regis aetatem; ut sic ipsis, invito domino, rem contrectantibus alienam, et in bonis regiis debacchantibus, interim rex mendicet." Towards the end of the year 1223 the effort led to the most formidable insurrection which it excited, that of the Earl of Chester and his supporters. It is possible that the financial needs of the government may have led it to stretch the law in other directions, but this is mere conjecture. Magna Carta must anyway greatly have hampered the regency in the free expansion of the revenue which would have been possible, if the methods of John could have been continued. The omission of cl. 12 gave no freer hand. Cl. 44 of the Charter of 1217, with the interpretation which the men of the time would certainly give it under the influence of the original Charter and the insurrection, accomplished all that was intended by cl. 12. Next to the fundamental principle which the Charter transferred from feudalism to the modern constitution, its great service was to emphasize so profoundly the feudal principle of consent to extraordinary taxation that for three quarters of a century no one ventured to disregard it. But both Henry III. and Edward I., from their point of view, may be excused for not recognizing the beauties of this principle. Looked at in this way the Charter was certainly "reactionary"; it was a "stumbling block" in the way of the formation of the kind of constitution which would probably have come into existence without it.

It has been supposed that in 1227, when Henry in form took the government into his own hands, the Great Charter was annulled, and that, from this date to its next formal confirmation in 1237, it was not in force. The idea is however due to a misapprehension, as has been clearly shown by an analysis of the evidence of 1227, and as is perhaps shown also by what look like attempts on the part of the pope to annul the Charter between 1230 and 1237.[8] In form at least, the Charter was in force throughout the entire reign, binding alike on king, courts and barons.

With 1227 the troubles of the reign began and they were continuous and consistent in character, despite some variety of detail, for nearly forty years. They were due, as is well known, to the character of the king. But Henry was not intentionally a bad king. In moral conduct, except when his financial difficulties led him to acts of meanness, he was greatly superior to his father. He intended to rule well and he thought of himself as a good and wise sovereign. He was jealous of his power. He knew there was danger to it in the air, though he did not understand the form in which the danger threatened, and he was determined to keep it in exercise himself, and to preserve it whole. Nor was his chief deficiency weakness of will, as was perhaps the case with Stephen, the king with whom he is most nearly to be compared. A more serious defect, in the crisis through which he was called to carry the royal power, was his weakness of intellect. This is seen not so much in that he did not understand his own time. Many rulers fail there. Rather he could not see the meaning or tendency of single events. He was no judge of men. He did not know what to do in difficulties. His government was continually directed by others without his knowing it, and he never had a consistent policy for any length of time except under the influence of a stronger personality. Richard of Cornwall, who was an abler man, though no political genius, exercised at intervals a strong influence over the conduct of affairs, and it might have been fortunate for the English kingship if he could have acquired permanent authority behind the throne.[9] He was not the type of man, however, toward whom

[8] See the careful study of what took place in 1227 by G. J. Turner, *Select Pleas of the Forest*, Selden Soc., XIII., p. xcix. As to the papal intention, a comparison of the bull of February 20, 1238, Rymer, *Foedera*, I. 234, with that of January 10, 1233, Shirley, I. 551, suggests at least that the Great Charter was among the grants intended to be revoked. See Bliss, *Calendar of Papal Documents*, I. 148 (June 21, 1235), and Matth. Par., III. 382, 368. Perhaps by his denial recorded on p. 368 the king may have meant that it was not intended to include Magna Carta, and see the third letter of the pope to the legate Otto, dated February 20, 1238, Bliss, I. 167, and also pp. 224, 225 (1246).

[9] See *Ann. Wykes*, p. 118; Matth. Par., III. 532; IV. 11; V. 73.

Henry inclined; it looks at times as if he felt some superiority in Richard and was jealous of him; at any rate during almost the whole of the reign the control of king and government was in the hands of inferior and more selfish men. It may be that Henry vaguely felt, as his father had clearly done, that his best support against his own baronage would be found in foreigners who should owe everything to him and who would naturally stand in opposition to the native aristocracy. Something could be said for such a policy if directed by a strong and able king, but in the case of Henry it meant the exploitation of England by successive sets of utterly selfish foreigners who lacked wisdom of their own to see the tendency of events, or properly to identify the king's cause with theirs. They did not hesitate to endanger England's interests in France for their own ends, and they had no defense to offer against a like abuse of the king's weakness by the pope.

Such a reign, guided by no strong will, or dominating policy, was opportunity. It was a period open to be shaped by whatever influences might prove strongest among the cross currents of the time, and whatever might be the outcome of the age, it would seem, in the absence of leadership, to be the natural end towards which all things had drifted.

Strong among the influences in such a period would be feelings due to experiences which lay not far in the background of the past. The king was not more conscious of the events in which his father's reign closed than were the barons.[10] In 1237 many must have been living who had gone through the time of struggle for the Charter. Of the twenty-five, at least four still survived. Of the twenty-seven named in the preamble, at least six.[11] Of these ten, six witnessed the confirmation in 1237. It would be very strange indeed if it were merely the Charter which men remembered, when it became necessary to demand of John's son the reform of abuses, and not also the general conditions which produced the Charter and of which it was to be the correction. When similar conditions returned, or what seemed to the actors in events similar conditions, it is natural that it was at first thought that a renewal of the Charter which had grown out of those conditions in the past would meet the case. It was only after some years that it was seen to be necessary to go further in the direction which the Charter had pointed out.

[10] Roger of Wendover (ed. Coxe), IV. 295; Matth. Par., V. 360, 729, 732.

[11] These were, of the twenty-five, John de Lacy, Richard de Percy, Roger de Montbegon and Richard de Montfichet; of the twenty-seven, the bishops of Winchester, Bath, and Worcester, William earl Warenne, Hubert de Burgh and Matthew FitzHerbert.

The reign then, looked at from this point of view, leads to two results, or series of results: First, confirmations of Magna Carta, and second, experiments at further control of the sovereign which culminate in the Provisions of Oxford and the Barons' War.

Confirmations of this sort begin with that of 1237. It must be understood that the reason and purpose of this confirmation was quite different from that of 1225. That was demanded and granted on general principles merely, to make sure that the Charter was in force and not affected by the disabilities of a minor grantor. This was for a specific purpose, to hold in check a king who had proved ready to lend himself to many abuses and difficult to restrain. Already, in 1233, Richard Marshal, in a spirit worthy of his inheritance, had thought himself driven to an appeal to arms, premature and almost useless, though the king was brought by other means to an appearance of reformation. It was a reformation, however, without a change of heart, and by 1237 the abuses complained of were as bad as ever and the character of Henry was somewhat better understood.[12] Advantage was taken of the king's necessities and his request for a new tax, to demand a confirmation of the Charter which was granted in a special charter and accompanied with a solemn renewal by Archbishop Edmund of Simon Langton's earlier excommunication of all who should offend against it.[13]

The demand for the Charter, however, was clearly, neither in 1237, nor at any later date in the reign, primarily a demand for its specific provisions. The abuses which were most bitterly complained of, Henry's dependence on foreigners, his neglect of his natural counsellors, a reckless squandering of money, were not directly aimed at in any of the clauses of Magna Carta. There is no evidence in this reign of any violation of its specific provisions which passes from the character of an individual grievance to constitute a danger to the baronage as a whole.[14] What was wanted

[12] The barons seem to have been easily persuaded, however, to accept the king's promises, as compared with later times, and Matthew Paris appears not to have been unconscious of the fact. See III. 383.

[13] The charter of confirmation is given in *Ann. Tewk.*, p. 103; Stubbs, *Select Charters* (eighth edition), p. 365; and see Matth. Par., IV. 186. On the excommunication, *cf.* Matth. Par., III. 382; IV. 366; V. 360; *Epp. Grosseteste*, p. 231; *Ann. Wykes*, p. 83. Grosseteste, who certainly wrote very soon after the event, and who witnessed the *parvam cartam* of 1237, probably states accurately what occurred.

[14] It may be thought that the denial of trial by their peers to Richard Marshal and his supporters in 1233 approaches the point of danger. See Matth. Par., III. 247, 251; *Bracton's Note Book*, case 857. Their case is, however, not wholly clear. See Vernon Harcourt, *His Grace the Steward*, pp. 276–280, with whom, however, I cannot entirely agree. It may be thought that the frequent complaints

was something different. It was to force the king to acknowledge that he was bound by certain obligations in his conduct of public affairs.[15]

It ought, I think, to be clear, if one reflects on the nature of the abuses, laid now and later to the king's charge, that a change was beginning which was the opening of a new era. All through the list the difference between Henry's case and John's is clear. Of wardship, marriage and the treatment of widows, it was not said that Henry was pushing royal rights beyond bounds to extort money to which he had no claim; it was said that he was using these rights to provide for foreign favorites at the expense of his own natural subjects. Of taxation it was not said that he was demanding illegal payments, but that sums, obtained properly according to the law, disappeared in a bottomless gulf without advantage to England. In matters that concern the courts, it is clear that the requirements of the Charter were in the main regarded, and complaints had shifted into a new field and affected the interests of the royal courts only indirectly. Of the miscellaneous provisions of the Charter the general fact is the same.[16] The really serious complaints do not con-

by ecclesiastics of the violation of liberties supposed to be secured the church indicate dangerous infringements of the Charter; but analysis of their complaints does not show this to be the case. On the other hand the statement in Pollock and Maitland, *History of English Law* (second edition), I. 179, must not be understood to mean more than it says. It is there said: "The pages of the chroniclers are full of complaints that the terms of the charter are not observed. These complaints, when they become specific, usually refer to the articles which gave to the churches the right to elect their prelates." No doubt that is true. But it would not be correct to infer that interest in the Charter as a practical matter was confined to ecclesiastics. It would be quite as accurate to say that it was confined to lawyers and law courts.

[15] This is true also of practically all the demands for the confirmation of Magna Carta after this date. They express not so much a desire that specific provisions of the Charter should be reaffirmed, though there is evidence in plenty that many of these were treated constantly as living law, as a desire to get the king's acknowledgment in general that he was bound by the law. They constitute a definite line along which the fundamental idea of the Charter was carried through the formative age of the constitution and they ceased only in the fifteenth century, when it had come to be no longer a matter of dispute that there was a certain body of law which bound the king, or in other words when something which may be fairly called, in almost a modern sense, the constitutional monarchy, had been established. These confirmations of the Charter were certainly no mere form and they were not necessary because "it failed to do its work" (Jenks, *l. c.*, p. 271). They were necessary because the kings were constantly devising new methods of escaping their obligations, and because there were constantly arising new interests and issues in which the king must be bound to serve the nation.

[16] See the Petition of the Barons of 1258, Stubbs, *Select Charters*, p. 382, for complaints of the violation of a number of the provisions of the Charter. It

cern them. In addition one thing of which the son is constantly accused was not alleged against the father at all—the neglect of his natural counsellors. It is a complaint typical of the transition, and involves in its brief statement cause and consequence of the crisis. It says: this king does not himself govern, the government is in the hands of his council which exercises his prerogatives for him and determines all that is done; his counsellors are now foreigners who have no regard for the interests of England or Englishmen but sacrifice both for their own selfish ends; foreigners have no right to hold such a position, the right belongs by nature to the baronage of England; if the king's natural counsellors were conducting the government, the abuses would cease and the interests of England and Englishmen would be conserved. There was no room for any such reasoning in the case of John. It would have been absurd to assert that anyone but himself was responsible for his tyranny, or to believe that a change of counsellors would bring it to an end. But this and not the violation of particular provisions of the law was the great difficulty with Henry.

The difference, however, was much deeper than a difference in personal character between father and son. It was the beginning of a difference between two ages of history, two eras of civilization. Translated into other terms this complaint meant: in the conduct of public affairs there is something which ought to be regarded besides the king, the king's interests and the king's friends; something which it is the plain duty of the king and his counsellors to regard. Over against the king's interests, stand the interests of the land and of those who have a stake in its prosperity, as something which may be different, something which the king may be tempted to sacrifice for what he selfishly desires. It is not possible to say "the nation" yet, as the modern man uses the term, but this is the idea and the fact which was really coming to birth. Such a conception was foreign to the feudal age, but feudalism, in its constitutional aspects, in the conception of the state logically involved in it, was rapidly coming to an end. The old ways of doing things, judicial, legislative, financial, military, were all giving way before the new. The emphasis which daily life placed on its own details was also changing. To the barons of 1215 the writ *Praecipe* and what it stood for seemed a vital matter. Before the close of Henry's reign, their descendants had come to care little about it, and indeed were letting slip from their hands with seeming indifference the

is evident, however, that these complaints played a very small part in producing the revolution. The real abuses which moved the barons to action were the newer ones, and it was at these that the Provisions of Oxford were aimed.

really essential elements of all private jurisdiction which were feudal proper in character, and not financial or manorial merely. Men were of course unconscious of any change. They could not have put into words in 1237 the ideas which were struggling for expression in the things they were doing. Nor could they even in 1264. When they tried they fell back upon the formulae of ancient speculation, or upon notions embodied in the feudalism they were destroying.[17] None the less they were really giving first and faint expression in their acts to modern conceptions of the balanced rights and obligations of government and nation which seem to us the commonplaces of politics.

If it had been possible for them to formulate their ideas clearly, they would not have been satisfied in the crises of 1237 to demand merely the confirmation of the Charter of 1225. There would have been added a more definite statement of the king's obligation to be bound in his conduct by the interests of the community. Their experience did not yet reach to such a conclusion. For us, however, as students of history, it is indispensable to understand that it was in its specific provisions only that Magna Carta did not apply. In the great principle on which it rested, its application to the crisis was perfect. There was in it a recognized body of right which the king was bound to respect. This law had for its object to protect the interests of the ruled against the selfishness and tyranny of the ruler. If the ruler could not otherwise be brought to observe it, force was a legal recourse and the temporary suspension of the king from ruling. All this was legitimately involved in Magna Carta, even as reissued in 1225. To the men of 1237, Magna Carta would stand out from all the past as the legal document giving most clear expression to this principle. This it was, vaguely realized, which was sought in it. It bound the king morally and legally and with all the sanctions of religion, in principle to conduct the government in the interest of his subjects. If he would do this, if he would be true to the spirit as well as to the letter of the Charter,

[17] See the arguments of the *Song of Lewes*. In saying that in 1215 the community established a right to compel the king to regard the law, I do not mean such basis of right as the *Song of Lewes* sought to formulate. Such abstract forms of justification will necessarily vary from age to age under the influence of men's changing philosophical predispositions. What had been established was a practical right, the right of precedent; men felt themselves authorized by what had happened in the past to do something of the kind which the present seemed to require, though no doubt from time to time contemporary philosophical ideas strengthened men's opinions and gave them confidence. Nor was the specific legal principle on which the barons acted in 1215 more permanent than the feudal rights which they sought to protect in the Charter, and which form the first content of the law which the king is bound to observe.

the troubles of the kingdom would cease. Not understanding the nature of their demand, they did not perceive that they were taking the first step towards adding to the formal requirements of the Charter a new and broader one, that the government must be managed in the interests of the governed. I think they were entirely right in feeling that this was properly implied in Magna Carta, but when the time came that the character of this requirement could be understood, a whole age had passed away, and a new civilization had possession of the world.

The confirmation of the Charter did not mend matters. Some part of what the barons called abuses was inevitable. There would have been complaint of the expenses of government under the most economical of kings. But Henry had no mind to any sort of reform. He no more understood the situation than did the barons, and he firmly believed that he was quite within his rights in choosing as counsellors whom he pleased, as indeed he was according to the letter of the law.[18] Within a few years the barons began to perceive that Magna Carta was insufficient. It did not enforce itself.

In saying that in the reign of Henry III. it was "seen that the Charter was not enough", Professor Jenks is quite right.[19] But it does not follow that in consequence the barons were led to attempt "an entire break with the past". That is to overlook the fact that in the reign of Henry III. exactly the same problem arose as in the reign of John. It was not the problem of getting the king to acknowledge the existence of a body of law which he was bound to observe. Both kings did that, Henry repeatedly. It was the problem of how to compel the king to keep the law when he persistently refused to do so.[20] This problem the barons of the middle of the century met as it had been met a generation earlier. They attempted no break with the past. In the next case to be noted, in 1244, as in 1258, they copied its model and built on the lines it had established, and, though the particular thing they sought to do was slightly different, and their machinery was more developed, their

[18] The peculiar glory of the English constitution is indicated in saying that precisely the same thing is true of King Edward VII. today, but that he does not exercise the right.

[19] But the same thing could be said of the Charter of 1215. It would not have enforced itself. The principle that the king is bound by a definite body of law would never have led to anything without the established practice of coercion.

[20] "Erat videre dolorem in populo, quia nesciebant praelati vel magnates quo nodo suum Prothea, scilicet regem, tenerent, etiamsi omnia haec concederet, quia in omnibus metas transgreditur veritatis", Matth. Par., V. 494 (1255). The statement is repeated in the account of the May meeting of 1258 as explanation of the adjournment till June, with the addition of the phrase "quia arduum fuerat negotium et difficile", *ibid.*, V. 689.

purpose was identical, the suspension of the king from office in certain particulars for the protection of the community. This purpose was a little more clearly perceived; it was a little more widely applied; and the machinery by which it was to be carried out had been somewhat improved.[21] But they found their starting point in clause 61 and they made no change which touched essentially principle or method, no change so vital that the experience of the intervening time may not easily account for it as a natural growth. Nor should it be forgotten that one of the twenty-five appointed under that clause was one of the commission of twelve chosen in 1244 to put into form the virtual suspension of the king.[22] We do not know that this arrangement, which has been called a paper constitution, ever actually went into force, the king refused to accept it, but in 1258 a real constitution was formed, more or less completely in operation for many months.

Looked at as a work of the thirteenth century, the Provisions of Oxford are a great improvement on clause 61 of Magna Carta, both in the object to be accomplished and in the machinery for doing it. Such advance in purpose and character was forced on the barons by the situation. What they had to do now was not to provide for the correcting of a number of specific abuses, of a generally uniform character, which might be done by assuming a single prerogative of the king's, as in the court created by clause 61. They needed rather to provide for the whole government, to take it out of the hands of an incompetent king, who could not be reformed, and conduct it in the interests of England. A purpose so much larger compelled machinery on a larger scale and of a broader scope. But it was the same in type. Clause 61 provided for the exercise by the court of twenty-five of one of the most important of the king's

[21] The improvement of machinery in the proposed arrangement of 1244, as compared with that of 1215, consists in the fact that the commission of the barons was not to take into its own hands a function of the king's for exercise in special cases, but that it was to appoint the great officers of the crown who were to exercise royal powers, and so provide for a more complete suspension of the king. While this arrangement is entirely in line with that of 1215, the exact suggestion of the appointment of the officers probably came from another source, perhaps from expedients of the minority, perhaps from the abuse of the great seal complained of by the barons. In stating the relationship between the experiments of 1244 and 1258, I am following what may be called the orthodox opinion. See Stubbs, *Const. Hist.* (1896), II. 64; and Tout, *Polit. Hist. of Engl.*, III. 66.

[22] Matth. Par., IV. 362–368. It is plain from the character of the last part of the document recorded by Matthew Paris that it is a memorandum merely, and from the reference to the *nova carta* at its beginning that it would finally have stood to the completed constitution which it was proposed to form in much the same relation as that of the Articles of the Barons to Magna Carta.

prerogatives, if he refused to use it himself to reform some definite abuse. It provided further, if this first step proved unavailing, for the temporary suspension of the king by moving war against him. To those of the barons who remained faithful to the Charter in the struggle which followed John's repudiation of it, it seemed necessary to remove him permanently and to put another sovereign in his place. This extreme step was never contemplated by the Charter. It was not quite in harmony with the spirit of the long process by which the constitution was made, or, if it cannot be denied that it was a logical inference from it, it was going to an extreme almost never called for. If we pass over the case of John, such a step proved really necessary but once, in 1688, and then not for the creation, but for the preservation, of the constitution.[23] In this particular the Provisions of Oxford were exactly in line with the intention of clause 61, with what it was hoped that clause would accomplish, but they show a great advance over it. Like the modern constitution, they would make civil war and the deposition of the sovereign impossible, if they were put fully into operation,[24] and the object of the machinery set up by clause 61 really was to make it possible to avoid an appeal to arms.

If one will compare carefully, as space does not here allow, in the object sought and in the intended details of operation when put into force, clause 61, the arrangement of 1244, and the Provisions of Oxford, I believe it will be found impossible to deny that they are all of one piece, all framed on one model, to solve essentially the same problem. They show only those changes which the passage

[23] Appeal to force was necessary in the case of Richard II. and of Charles I. But the earlier reign of Richard shows conclusively that the extreme step taken was not necessary against him, and the same thing is highly probable of Charles I. Edward II.'s deposition was not in reality a constitutional case at all, though it was necessary to try to make it seem so, and though it did serve as a precedent for later action in cases that were more truly in the line of constitutional development.

[24] No real similarity between the Provisions of Oxford and the present constitution must be supposed. The only historical connection between them is that the Provisions were one stage in the development, clarifying and enforcement of the idea that the king is bound by the law. The final constitution was built on no detail of the scheme. To say that the responsibility of the officers of the crown to the Great Council, which they established, foreshadows the ministerial responsibility of today, is to use language which is permissible rhetorically, but it is not the language of science. There is no line which runs from the earlier fact to the later. The two facts grew out of the independent conditions of two different civilizations. There was no Parliament to enforce the Provisions of Oxford, only the feudal *curia regis*; they could draw strength from no nation, only from a feudal class. One civilization was indeed beginning to give way to the other, but it was the old which still had possession of the field. In ultimate purpose the constitution of 1258 was premature; in process it was already almost obsolete.

of a generation, and the naturally changing situation required. The plan of 1244 is the intermediary, the connecting link, between Magna Carta and the Provisions of Oxford. It may be fairly called this because it stands out most prominently, and is the most complete proposal between these two so far as we know. It would perhaps be more accurate to say that there are evidences earlier that the plan of temporarily vesting in another the prerogatives, or a prerogative, of the king, as a means of holding him in check, had not been forgotten, and that between 1244 and 1258 there are numerous instances of the demand of some such scheme, or of the bringing of it forward as a suggestion or a threat.

By 1258 not merely had abuses, financial and other, grown to be intolerable, but circumstances favored decisive action as they had not before. In the first place Earl Richard, who might have stood between the monarchy and the complete carrying out of any revolutionary scheme, was out of the country. Again the great body of the higher baronage was united on one side, against the king and his foreign favorites, and had with it the strong support of the minor barons. Finally, perhaps alone sufficient to explain the result, the opposition to the king had found what it had lacked heretofore, adequate leadership. It is hardly possible to call Simon de Montfort a political genius. To me at least he seems to have mismanaged, almost grossly, what he had to do both in Gascony and in England. But he had certain qualities and elements of character peculiarly demanded in the leader of a revolution against established government. His most marked trait is the most necessary in such a leader, his immense power of will, his inflexible determination. Imperious his will was, overbearing his own judgment as well as all criticism and opposition of others, impolitic to a degree, but it was unhesitating and unyielding, it took no account of odds or danger, it saw the one result to be reached and neither heaven nor hell should block the way. To this must be added a strong sympathy with justice, vigor of action, more than the average of military skill, and, I think I am not wrong, the vaulting ambition of Macbeth. Perhaps it needed Simon de Montfort's personal grievances against the king to put him at the head of a revolution, but once there he threw into it the whole strength of a nature powerful and gifted, but not always wise, and possibly not always sincere.

It is not the place here to discuss the details of the Provisions of Oxford, nor, what stands more in need of discussion, the relation to them of the Provisions of Westminster. The scheme was an elaborate one. It sequestered the king entirely from the govern-

ment. All the operations of the state, financial, administrative, judicial, legislative, were to be carried on under a direct responsibility to the Great Council. A series of commissions and appointed officers, including a new king's council, was to conduct the government, and the Great Council vested its supervising authority in a committee, practically to be in continuous session. The king was not deposed. In form all prerogatives were still exercised by him, all writs and royal letters were issued in name by him, even when he was a helpless prisoner in the hands of the Earl of Leicester. The Provisions of Oxford set up machinery to take the government out of the hands of a king who persistently refused to administer it in the interests of the country, without the necessity of deposing him, or of bringing on civil war.[25] This was clause 61 of Magna Carta over again more broadly framed and more explicitly stated.

To recapitulate: the Provisions of Oxford find their origin in Magna Carta and rest directly upon it. They draw from it their underlying idea, the right to coerce the king; their form, commissions assuming prerogatives of the king and so far forth suspending him from office; and their general purpose, to secure the rights of the community against a king who persistently refused to regard them. They are connected with it by a continuous line both of confirmations of the Charter and of suggestions and experiments in the way of similar machinery.

But the Provisions show a great advance. They are more elaborate in machinery, wider in scope and logically more complete. But more important still it was much less their object to enforce specific rights of individuals which could be drawn up in an exact list than was that of the Charter. Their object was rather to enforce the general right of the community of the ruled to good government, administered by natural, as they said, that is, national officers. This is the great advance. This it is which makes the Provisions of Oxford the first and longest step in the transformation of the feudal principles of Magna Carta into the guiding principles of constitutional growth. The Provisions of Oxford do look towards the future more clearly than the Great Charter, but not because they are a break with the past, not because they are a new beginning, rather because they are building from foundation stones of the old on further into the walls of the final structure.

The Barons' War which followed was in principle the same as that which followed John's repudiation of the Charter. The *diffi-*

[25] War was threatened against those who should oppose themselves to the Provisions. See the king's writ in English. *Foedera*, I. 378; Stubbs, *Select Charters*, p. 396, and compare *Ann. Wykes*, p. 119, for the royalist view.

datio which the barons issued before beginning their campaign in 1263, with its *salva persona regis, regine, et liberorum suorum,* seems based on the text of clause 61.[26] Simon de Montfort's formulation of the right of insurrection, in the confirmation of the charters which were issued as one of the conditions of the release of Edward from his obligations as hostage for his father, in March, 1265, is of especial interest. The document is a peculiar one among confirmations.[27] It was made to suit the occasion in other ways than that which gives it its common name, but its documentary connection with Magna Carta is clear enough. In the end the barons were defeated and the Provisions overthrown, but they left as their legacy to the future the two principles on which Magna Carta rested, which might have perished without their renewed emphasis.

The reign of Edward I. saw no repetition of the experiment of 1258. Edward was a king against whom such an expedient was unnecessary, as it would have been impossible. The reign was occupied with the equally important effort to take the first steps in the constitution of Parliament. But in one particular the reign carried forward the line of development represented by the Provisions of Oxford. In 1297 Edward was forced, by means the same as those employed so many times against his father, to confirm Magna Carta, and to go a step further. The confirmation included what was really an addition to the Charter, in truth a restoration to it of clause 12 which had been dropped in 1216, so thought of and intended at the time,[28] and so treated in the future. It was more, however, than a restoration of clause 12. It was a restatement of it in such form as to include not merely the specific taxation of the feudal age, but so also as to affirm the broad principle of consent to all taxation, not resting on the basis of feudal property. It is clause 12, *i. e.,* the principle of the feudal law concerning extraordinary taxation, broadened out to cover, in intention at least, the new methods of taxation of the modern state. This enlargement of the law that binds the king, was the initial point of all the great increase of that law during the next century, and it was, as I have said, forced

[26] See *Lib. de Antt. Legg.,* p. 53.

[27] Stubbs, *Select Charters,* p. 416.

[28] The petition of the barons which preceded the confirmation bears in the chronicle of William of Hemingburgh (ed. Hamilton), II. 152, the title *Articuli inserti in Magna Carta,* and even if we cannot be sure that these are more than the words of this contemporary and generally accurate chronicler, they indicate to some extent the feeling about the effect of what was then done. The insertion of the main point of the petition about taxation in the formal confirmation which followed makes it distinctly an addition to the Charter, *i. e.,* to the body of law which the king must observe.

from the king in the same way that similar concessions were forced from Henry III. It belongs in other words not in the line of the Parliamentary development of the constitution as that is seen later, but in the line of the origin of the constitution as that ran through the thirteenth century. This line is continued by the Lords Ordainers in 1310, but the connection of their work with the Provisions of Oxford needs no emphasis here.[29]

It is to be said of all such schemes, however, that they are revolutionary when looked at from the point of view of the ordinary law,[30] the law as administered in the courts and found in the books of the law writers, so far at least as these do not touch upon questions of the constitution.[31] In this field the king was then, as he is today, above the law. He was not subject to its processes; he was not bound by its provisions. A Henry III. might be guilty of fraud or forgery with impunity. This is the ever present contradiction of English history, but it is also the secret of the making of that unique constitution, most anomolous and inconsistent, but perhaps on that account most adaptable, of all time. It was by the working together of these two contradictory principles, the king is above the law, the king is subject to the law, that a monarchy, retained in form, preserving all that is useful in a monarchy, was transformed into a self-governing republic, politically democratic.

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[29] Stubbs, *Const. Hist.*, section 251; Tout, *Polit. Hist. of Engl.*, III. 244, 248.

[30] Louis IX. was quite right in his decision annulling the Provisions of Oxford by the Mise of Amiens, for this was the only point of view from which he could look at the question. He did not see the inconsistency of this part of his decision with that maintaining Magna Carta in force, as the barons appear to have done, or some of their supporters at least somewhat later. *Ann. Worc.*, p. 448; *Chron. de Bellis* (ed. Halliwell), p. 17.

[31] They nearly all do to some extent touch upon the constitution, and then this fundamental contradiction is apt to occur more or less plainly. In the case of Bracton, it has excited considerable discussion, but, except for its early date, it should occasion no more remark than in the case of Blackstone. See Maitland, *Bracton's Note Book*, I. 29–33. It should not be overlooked that the probably apocryphal passage in certain Bracton MSS., in which the right of the *curia* to hold in check the king is stated in the most extreme terms, is certainly of the thirteenth century, and probably earlier than 1290. The clearest statement of the principle that the king is bound by the law, in the great series of English constitutional documents, is in the Bill of Rights of 1689.